

April 9, 2014

**RE: Hearing on the Trade Implications of U.S. Energy Policy and the Export of Liquefied Natural Gas (LNG) and Pending Bills to Expedite U.S. LNG Exports**

Dear Congressman Nunes and House Members,

I am licensed to practice law in California and recently served as a Visiting Assistant Law Professor at the University of Houston Law Center where I taught a course on the legal, policy and environmental aspects of global shale gas development and the role of liquefied natural gas (LNG) in global gas markets.

I have a LL.M. from Georgetown Law in International Trade and also teach a seminar on the WTO as an adjunct law professor at the University of San Francisco School of Law and am familiar with the international trade and WTO issues raised in the context of U.S. LNG exports. Prior to teaching, I was a commercial litigator in San Francisco and remain a member (inactive status) of the California Bar.

I am also the author of the most recent book on LNG entitled ENERGY FOR THE 21<sup>ST</sup> CENTURY: OPPORTUNITIES AND CHALLENGES FOR LIQUEFIED NATURAL GAS (LNG), which discusses the globalization of gas markets and the prospects for U.S. LNG exports in detail.<sup>1</sup>

I have previously expressed some of my views on U.S. LNG exports in a brief submitted to the U.S. Department of Energy (DOE), Office of Fossil Energy, in response to the NERA LNG Study.<sup>2</sup> In that brief, I analyzed the various arguments that had been raised by all parties and made the following recommendations which I believed would allow DOE to fulfill its mandate to protect the “public’s interest” while processing additional LNG export applications in a reasonable and prompt manner:

1. Immediately re-start the approval process by approving a limited number of export applications in an amount not likely to have a significant impact on the domestic price of natural gas or the “public’s interest.”
2. Immediately develop a fair and transparent process and procedure that details how the DOE/FE will fulfill its stated obligation to “monitor the cumulative impacts” of approving additional export applications.
3. Consider phasing in the approval of projects over a certain period of time so as to minimize the potential impacts on price and/or as more information becomes known about natural gas supply, demand and potential environmental impacts of hydraulic fracturing and shale gas development.

I now submit the following comments in response to the House Ways and Means Trade Subcommittee

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<sup>1</sup> Susan L. Sakmar, ENERGY FOR THE 21<sup>ST</sup> CENTURY: OPPORTUNITIES AND CHALLENGES FOR LIQUEFIED NATURAL GAS (LNG) (2013), Edward Elgar (Pub.), [http://www.amazon.com/Energy-21st-Century-Opportunities-Environmental/dp/1849804214/ref=sr\\_1\\_1?ie=UTF8&qid=1397033918&sr=8-1&keywords=susan+sakmar](http://www.amazon.com/Energy-21st-Century-Opportunities-Environmental/dp/1849804214/ref=sr_1_1?ie=UTF8&qid=1397033918&sr=8-1&keywords=susan+sakmar)

<sup>2</sup> U.S. Dept. of Energy, Office of Fossil Energy, LNG EXPORT STUDY - RELATED DOCUMENTS, <http://energy.gov/fe/downloads/lng-export-study-related-documents>.

hearing on the Trade Implications of U.S. Energy Policy and the Export of Liquefied natural Gas (LNG). These comments are also applicable to a growing number of bills pending in the House including in particular H.R. 6, the Domestic Prosperity and Global Freedom Act, which is scheduled for markup in the Subcommittee on Energy and Power on April 8-9, 2014.<sup>3</sup>

For the reasons detailed below, I urge Congress not to take action on any of the pending bills. The DOE has already approved half of America's natural gas production for export so there is no compelling reason to expedite even more exports. Moreover, the pending bills would improperly waive the "public interest" determination the DOE is currently applying on a case-by-case basis to export applications, thereby defeating the key purpose of the Natural Gas Act which is to protect consumers. Lastly, none of the pending bills would serve the stated goal of sending U.S. natural gas to allies such as Ukraine, but would instead help the highest bidder for America's gas, which would likely include countries such as China and other Asian nations that pay higher prices for gas.

## **I. There Is No Need to Expedite LNG Exports Since the DOE Has Already Approved Over Half of Current U.S. Gas Production for Export**

### **A. Free Trade Agreement (FTA) v. Non-FTA Countries**

At the outset, it is important to note that under existing U.S. law, export applications to export to most free trade agreement (FTA) countries are deemed to be in the public interest and such applications are quickly authorized by the Department of Energy, Office of Fossil Energy (DOE/FE).<sup>4</sup>

Most, though not all, countries that have an FTA with the U.S. require national treatment for trade in natural gas, including Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Peru, Republic of Korea, Singapore and Panama.<sup>5</sup>

With the exception of the Republic of Korea, Chile, and Singapore, which is trying to establish an LNG trading hub, most of the FTA countries are not likely to be significant importers of LNG so the real prize for a company is the authorization to export LNG to any country, which the DOE refers to as "non-FTA" countries. Applications for export authorization to non-FTA countries involve greater scrutiny and under Section 3(a) of the Natural Gas Act (NGA), 15 U.S.C. § 717b, DOE performs a thorough public interest analysis before acting and is authorized to attach terms or conditions to orders that are necessary or appropriate to protect the public interest.

### **B. The DOE Has Already Approved A Significant Amount of Exports After Making A "Public Interest" Determination**

Subsequent to the release of the NERA LNG Study, the DOE resumed its approval of LNG export applications to non-FTA countries (the applications for FTA approval had not been delayed by the NERA study). Consistent with the public interest requirement, the DOE continued to process the pending non-FTA application on a case-by-case basis, following the order of precedence previously established. While

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<sup>3</sup> House Energy & Commerce Committee, markup on H.R. 6., the Domestic Prosperity and Global Freedom Act, <http://energycommerce.house.gov/markup/markup-notice-subcommittee-vote-lng-exports-bill-next-week>.

<sup>4</sup> 15 U.S.C. § 717b (2006).

<sup>5</sup> For example, Costa Rica and Israel do not require national treatment for trade in natural gas. U.S. Dep't of Energy, *How to Obtain Authorization to Import and/or Export Natural Gas and LNG* (Sept. 26, 2012), [http://www.fossil.energy.gov/programs/gasregulation/How\\_to\\_Obtain\\_Authorization\\_to\\_Import\\_an.html](http://www.fossil.energy.gov/programs/gasregulation/How_to_Obtain_Authorization_to_Import_an.html).

the DOE's case-by-case process has resulted in slower approvals than the industry would like,<sup>6</sup> **the DOE has in fact already approved over half of current U.S. natural gas production for export!**

As of March 24, 2014, the DOE has approved long-term applications to export over 37 Bcf/d of natural gas to FTA countries. To put this in perspective, 37 Bcf/d is 290 million metric tonnes per annum (MTPA) of LNG (using the DoE's conversion factor of 1 Bcf/d = 7.82 mtpa). This is around 50 MTPA more than was produced worldwide in 2012. **Perhaps most significant is the fact that 37 Bcf/d represents over half of current U.S. production of natural gas of approximately 70 Bcf/d.**

In terms of non-FTA approvals, the DOE crossed the psychologically significant 6 Bcf/d threshold when it approved Dominion's Cove Point Project, thereby cumulatively authorizing non-FTA exports totaling 6.4 Bcf/d. The 6 Bcf/d of non-FTA approvals was significant because most of the economic studies analyzing the impact of exports on the domestic price of natural gas have used a 6 Bcf/d minimum and 12 Bcf/d maximum.<sup>7</sup> In addition to Dominion (.77 Bcf/d), the non-FTA approvals are Cheniere's Sabine Pass (2.2 Bcf/d), Freeport's first application (1.4 Bcf/d), Lake Charles Exports (2.0 Bcf/d), Freeport's second application, (0.4 Bcf/d), Cameron (1.7 Bcf/d) and most recently, Jordan Cove (0.8 Bcf/d).<sup>8</sup>

The amount currently approved for non-FTA export totals 9.27 Bcf/d or approximately 72 MTPA, which is a massive amount of LNG.<sup>9</sup> To put this in perspective, the world's largest LNG exporter is Qatar, with current export capacity of 77 MTPA. Australia has numerous LNG export projects under construction and is expected to meet or exceed Qatar's LNG export capacity by the end of the decade. Even if just a fraction of the proposed U.S. LNG export capacity came to fruition, the U.S. will rival both Qatar and Australia in terms of exports.

It is my understanding that most, if not all, of the volumes authorized for the non-FTA projects have already been contracted out to buyers, or "off takers," although Cheniere's Sabine Pass project is the only project currently under construction. The significance of committed off takers should not be overlooked since this means it is likely that **ALL** of the approved non-FTA project will take final-investment-decision (FID) and move forward. The fact that all of the current non-FTA projects, with the exception of Jordan Cove, are already existing import terminals also makes it more likely that the project will move forward since these projects will be less expensive than new Greenfield projects.

A deeper understanding of the amount of supply under contract for non-FTA projects should be obtained before more exports are approved. While the larger non-FTA projects have garnered the most attention in the media, a deeper understanding of whether the numerous FTA only projects are likely to be viable

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<sup>6</sup> There is no dispute that the current process is less than ideal which has led to some, including myself, to suggest that a rulemaking would be appropriate. Susan L. Sakmar, What's Next for US LNG Exports – A Rulemaking?, Gastech News, <http://www.gastechnews.com/lng/whats-next-for-us-lng-exports-a-rulemaking/>.

<sup>7</sup> See, U.S. Energy Info. Admin., Effect of Increased Natural Gas Exports on Domestic Energy Markets (Jan. 2012), available at [http://www.eia.gov/analysis/requests/fe/pdf/fe\\_lng.pdf](http://www.eia.gov/analysis/requests/fe/pdf/fe_lng.pdf), Deloitte MarketPoint LLC and the Deloitte Ctr. for Energy Solutions, *Made in America: The economic impact of LNG exports from the United States* (Dec. 2011), available at

[http://www.deloitte.com/assets/DcomUnitedStates/Local%20Assets/Documents/Energy\\_us\\_er/us\\_er\\_MadeinAmerica\\_LNGPaper\\_122011.pdf](http://www.deloitte.com/assets/DcomUnitedStates/Local%20Assets/Documents/Energy_us_er/us_er_MadeinAmerica_LNGPaper_122011.pdf), Charles Ebinger et al., Brookings Institution Energy Security Initiative, *Liquid Markets: Assessing the Case for U.S. Exports of Liquefied Natural Gas* (May, 2012), available at <http://www.brookings.edu/research/reports/2012/05/02-lng-exports-ebinger>.

<sup>8</sup> Summary of LNG Export Applications, <http://energy.gov/fe/downloads/summary-lng-export-applications>.

<sup>9</sup> Most of the applicants seeking authorization to export LNG from proposed facilities to FTA countries have also filed to export LNG to non-FTA countries in the same volume from the same facility to provide optionality on the final destination country. The volumes of the application to export to FTA countries and non-FTA countries are therefore not additive.

should also be obtained. Many of these FTA only projects are seeking to ship LNG via ISO container and as a result, do not require the massive infrastructure and capital expenditures as the larger non-FTA projects. While the volumes for the FTA only projects are small on an individual basis, the cumulative volume is significant and could be a surprise to the upside in terms of exports if more go forward than realized.

## **II. The Pending Bills Would Improperly Waive the “Public Interest” Requirement**

The political crisis in Ukraine and Russia’s annexation of Crimea has prompted some members of Congress to introduce legislation under the misguided belief that U.S. LNG exports will aid our allies in Ukraine and Europe. At least five pieces of legislation have been introduced including:<sup>10</sup>

[H.R. 6](#) (Gardner, R-CO), the Domestic Prosperity and Global Freedom Act, would provide for expedited approval of gas exports to World Trade Organization countries and grant without modification or delay gas export applications for which a notice has been published in the Federal Register before March 6, 2014. Read more in the [press release](#).

[S. 2083](#) (Udall, D-CO), the American Job Creation and Strategic Alliances LNG Act, would allow for approval of natural gas exports to World Trade Organization member countries, including Ukraine, Japan and India. Read more in the [press release](#).

[H.R. 4139](#) (Turner, R-OH), the American Job Creation and Strategic Alliances LNG Act, would deem as in the public interest gas exports to a World Trade Organization country.

[H.R. 4155](#) (Poe, R-TX), the Fight Russian Energy Exploitation (FREE) Act, would deem as in the public interest gas exports to the member states of the European Union or certain former Soviet states.

[S. 2088](#) (Markey, D-MA), the American Natural Gas Security and Consumer Protection Act would require the U.S. Department of Energy (DOE) to consider the impacts of proposed gas exports on consumers, the U.S. economy and manufacturing sectors, national security, foreign policy, and other considerations before approving additional natural gas exports to ensure that those exports are in the national interest. Read more in the [press release](#).

With the exception of Senator Markey’s bill, which notably is the only bill that seeks to protect consumers, all of these bills would effectively **remove** the current public interest determination requirement under the NGA.

Particular attention is warranted for H.R. 6, set for mark-up April 8-9, 2014. Section 2 of H.R. 6 would amend Section 3(c) of the NGA to include all World Trade Organization (WTO) member nations. This would have the practical effect of requiring the DOE to approve ALL export applications “without modification or delay,” the standard currently applied to the applications to the FTA only countries.

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<sup>10</sup> Sutherland LNG Blog, March 11, 2014, <http://www.lnglawblog.com/2014/03/ukraine-crisis-spawns-six-bills-on-u-s-lng-exports/>

**A. The “Public Interest” Test Must Be Maintained to Achieve the Primary Purpose of the Natural Gas Act – To Protect Consumers**

Regulation of natural gas in the United States has experienced many years of regulatory evolution. But the primary purpose of the Natural Gas Act (NGA) has essentially remained the same for decades – “protection of consumers against exploitation at the hands of natural-gas companies.”<sup>11</sup>

In the context of U.S. LNG exports, the protection of consumers is delegated to the DOE who has indicated that it will continue to take a “measured approach” in reviewing the pending export applications and will continue to assess the cumulative impacts of each succeeding request for export authorization on the public interest with due regard to the effect on domestic natural gas supply and demand fundamentals.

Going forward, the DOE should continue to proceed with caution in approving additional export projects for several valid reasons that the DOE has articulated:

1. The LNG Export Study, like any study based on assumptions and economic projections, is inherently limited in its predictive accuracy,
2. Applications to export significant quantities of domestically produced LNG are a new phenomena with uncertain impacts, and
3. The market for natural gas has experienced rapid reversals in the past and is again changing rapidly due to economic, technological, and regulatory developments.

In short, the DOE has correctly recognized that *“The market of the future very likely will not resemble the market of today.”*<sup>12</sup> As such, it is incumbent on Congress and the DOE to maintain the current public interest determination since this is the best way to ensure vigilant protection of the public’s interest in times of significant market fluctuations, which seems to characterize the U.S. natural gas markets.

**B. The WTO Does Not Require the Removal of the Public Interest Determination**

A number of policy makers and industry representative that support unfettered LNG exports have raised the argument that DOE’s adherence to the bifurcated process between FTA and non-FTA applications could give rise to a violation of the U.S.’s obligations under the WTO. It should be noted that the DOE has already rejected similar arguments in the Sabine Pass case. In its application, Sabine Pass requested the DOE to review its request to export LNG to WTO countries under the same standard of review applicable to FTA countries and specifically requested that that DOE conduct its review under the standards set forth in section 3(c) of the NGA, 15 U.S.C. 717b(c) instead of section 3(a) of the NGA, 15 U.S.C. 717b(a).<sup>13</sup>

In making its request, Sabine Pass contended that U.S. trade policy, as well as U.S. obligations under the WTO, required the “automatic export authorization process” applicable for export of LNG to FTA

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<sup>11</sup> Robert R. Nordhaus, *Producer Regulations and the Natural Gas Policy Act of 1978*, Natural Resources Journal (1979), citing *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 689 (1954).

<sup>12</sup> Order No. 3324 Conditionally Granting Long-Term Multi-Contract Authorization To Export Liquefied Natural Gas By Vessel From The Lake Charles Terminal To Non-Free Trade Agreement Nations, <http://energy.gov/fe/downloads/fe-docket-no-11-59-lng>.

<sup>13</sup> Sabine Pass Application at 2-3.

Countries and therefore sought DOE/FE's immediate approval to export LNG to WTO countries.<sup>14</sup> In support of its argument, Sabine Pass submitted Annex 1A to the WTO Agreement and "a compendious legal memorandum" entitled "A Review of International Trade-Related Legal Obligations and Policy Considerations Governing U.S. Export Licenses for Liquefied Natural Gas" (Aug. 23, 2010).<sup>15</sup> Despite Sabine Pass's extensive briefing of the trade issues, the DOE found that Sabine Pass's request for review under section 3(c) was "not supported by law or policy."<sup>16</sup>

The DOE stated that section 3(a) of the NGA, not section 3(C) was the appropriate legal provision to decide an application to export LNG to any nation other than FTA countries. Since Sabine Pass had not pointed to any legislation authorizing or requiring a different result, the DOE had no authority to grant Sabine Pass's request for section 3(c) review.<sup>17</sup> On October 21, 2010, DOE issued an opinion and order denying Sabine Pass' request that their export application be reviewed under section 3(c) of the NGA and ordered that the application be reviewed under section 3(a) of the NGA, which requires the "public interest" analysis.<sup>18</sup>

It should also be noted that while most proponents of free trade assume that the WTO provisions would apply to trade in energy, there has, in fact, never been a formal Trade Round launched on Energy Trade. My research reveals that this is for a number of reasons including the fact that when the WTO came into being in 1995, most of the major energy exporters, such as Saudi Arabia and Russia were not members of the WTO.<sup>19</sup>

Moreover, not only were the key U.S. laws at issue here written when the U.S. was expected to be a major *importer* of LNG but they were also written prior to the establishment of the WTO in 1995! In light of the fact that the Policy Guidelines the DOE is obligated to follow were established in 1984, it is unlikely that any WTO issues were even contemplated, although it is possible that some issues broadly related to free trade and international trade were considered.

In addition, the WTO has repeatedly recognized that "exhaustible natural resources" are accorded different treatment under the WTO's Article XX exception for trade measures designed to protect "exhaustible natural resources." Despite the abundance of natural gas currently found in the U.S., natural gas would no doubt be considered an "exhaustible natural resource" under the WTO.

In summary, while the U.S. and its agencies should always be mindful of its obligations under international trade law, it would seem that the proper course of action in this case is the one that the DOE has already undertaken in the Sabine Pass case which is to review the pending export applications under the "public interest" test set forth in section 3(a) of the NGA and pursuant to the Policy Guidelines.

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<sup>14</sup> Sabine Pass Application at 23-29.

<sup>15</sup> Sabine Pass Liquefaction, LLC, FE Docket No. 10-111-LNG, *Opinion and Order Denying Request for Review under Section 3(c) of the Natural Gas Act*, Oct. 21, 2010, at 3, available at [http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders\\_Issued\\_2010/Sabine10\\_111dk.html](http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders_Issued_2010/Sabine10_111dk.html).

<sup>16</sup> Opinion and Order at 6.

<sup>17</sup> Opinion and Order at 7.

<sup>18</sup> Opinion and Order at 8.

<sup>19</sup> Susan L. Sakmar, *Bringing Energy Trade Into the WTO: The Historical Context, Current Status, and Potential Implications for the Middle East Region*, 18 *Indiana Int'l & Comp. L. Rev.* 89 (2008), available at <http://ssrn.com/abstract=1995896>.



### III. The Pending Bills Would Help China and Asia, NOT Ukraine and Europe

The pending bills were introduced with the stated goal of hastening LNG exports to Ukraine and Europe so that our allies there could reduce their dependence on Russian gas. Numerous experts and news accounts have already dispelled this misguided policy goal for a variety of reasons,<sup>20</sup> including the fact that Ukraine does not have an LNG import terminal,<sup>21</sup> export terminals in the U.S. have yet to be built, and perhaps most importantly, Europe is actually turning away LNG<sup>22</sup> and importing cheap U.S. coal!<sup>23</sup>

The pending bills also seem to ignore the fact that allowing unfettered LNG exports to any WTO member might not be in the best interests of America. There are currently 159 WTO countries,<sup>24</sup> which include many U.S. allies but also include many countries with which the U.S. has less favorable trade relations – most notably China and Russia. The modification proposed by H.R. 6 would effectively grant China and Russia immediate access to an unrestricted amount of U.S. natural gas! While China is the most obvious beneficiary, in light of the fact that export licenses are for 20-years, it is not inconceivable that Russia might someday seek to import U.S. gas.<sup>25</sup>

There is already the likelihood that China will be a major beneficiary of cheap U.S. gas with reports that companies are in the process of securing export deals with China.<sup>26</sup> In addition, any off taker of a project that has non-FTA approval is free to send that gas any where in the world. For example, one of the off takers of Cheniere's Sabine Pass project is BG Group. BG Group is a major LNG portfolio player, which means it has LNG projects all over the world and can ship LNG to or from a great number of countries. BG Group also has a contract with China's CNOOC to supply CNOOC with LNG.<sup>27</sup> If desired, BG Group could simply send its gas from Sabine Pass to China. KOGAS is another off taker of Cheniere's Sabine Pass and in lieu of sending its gas to Korea, KOGAS is free to send that gas anywhere in the world.

**In summary, the export of U.S. LNG is merely an arbitration opportunity for energy companies and energy traders.**

As trading companies have emerged from relative obscurity to become formidable players in global energy markets, there is a growing need for policy makers to understand the full implications of who owns the natural gas production in the U.S., how it will be traded and by whom, and where America's natural gas is likely to go if unfettered LNG exports are permitted.

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<sup>20</sup> See, "[Years Needed for LNG Exports to Blunt Russia Energy Sales](#)," Bloomberg, March 7, 2014; "[Energy security: The price of diversity](#)," Financial Times, February 23, 2014; "[An Energy Weapon vs. Russia](#)," Council on Foreign Relations, March 5, 2014; "[Help is Not on the Way](#)," Foreign Policy, March 7, 2014.

<sup>21</sup> Lithuania has a new import terminal and Poland has one under construction.

<sup>22</sup> Spain, Europe's largest LNG importer, has actually been re-exporting record amounts of LNG to higher paying Asian Markets.

<sup>23</sup> EIA Today in Energy, Nov. 15, 2012, Europe and Asia are the leading destinations for U.S. coal exports in 2012, <http://www.eia.gov/todayinenergy/detail.cfm?id=8790>.

<sup>24</sup> The current list of WTO countries is available at [www.wto.org](http://www.wto.org).

<sup>25</sup> Indeed, there is a growing list of LNG exporters that are now seeking to import LNG including Egypt and Malaysia.

<sup>26</sup> Oleg Vukmanovic and Edward McAllister, "World buyers line up to buy U.S. natural gas," Reuters, Jan. 24, 2014, <http://www.reuters.com/article/2014/01/24/us-lng-sales-idUSBREA0N0XS20140124>.

<sup>27</sup> [www.bg-group.com](http://www.bg-group.com)

It should be abundantly clear that energy companies and energy traders have every incentive to export every single drop of America's natural gas to the highest bidder. If this is the outcome, as I believe it could be if Congress passes any of the pending bills, then policy makers should be prepared to explain to American voters why this is in the "public's interest" or why they failed to miss the warning signs.<sup>28</sup>

Based on the foregoing comments and analysis, I urge Congress not to pass any of the pending legislation that would remove the public interest requirement and allow for unfettered LNG exports to any member of the WTO.

Respectfully submitted,

A handwritten signature in dark ink, reading "Susan L. Sakmar". The signature is fluid and cursive, with the first name "Susan" and last name "Sakmar" clearly legible.

Susan L. Sakmar

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<sup>28</sup> If the financial crisis of 2008 taught us anything, it is that policy makers must not ignore warning signs and must not fail to question, understand and manage evolving risks within a system essential to the well being of the American people. *Conclusions of the Financial Crisis Inquiry Commission*, <http://fcic.law.stanford.edu/report>.